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IN THE

Supreme Court of the United States

04-1244

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

04-1352

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

The *amicus curiae* will address the following question:

Whether the Hobbs Act, 18 U.S.C. §1951, applies to threats or acts of violence which affect interstate commerce, but which are unrelated to robbery or extortion?

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BRIEF FOR THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS JOSEPH SCHEIDLER *ET AL.*

INTEREST OF THE AMICUS

Concerned Women for America ("CWA") has 500,000 members in all 50 states and is the largest public policy women's organization in the United States. CWA encourages policies that strengthen families, and advocates the traditional virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Therefore, CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment. CWA believes that the decision of the lower court poses a significant threat to those rights.[1]

In the decision below, the Seventh Circuit made the unprecedented ruling that violent acts or the threat of violent acts violate the Hobbs Act, even if such acts are unrelated to

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1 Pursuant to Rule 37.6 of this Court, no counsel for a party authored this brief in whole or in part, and no person or entity other than CWA and their counsel made any monetary contribution to the preparation or submission of this brief. Counsel for Petitioners Joseph Scheidler, *et al.* in No. 04-1244, counsel for Petitioner Operation Rescue in No. 04-1352, and counsel for Respondents in both cases have each consented to the filing of this amicus brief. The written consent of each counsel accompanies this brief.

robbery or burglary. This dangerously expansive definition of the Hobbs Act violates the plain wording of the statute. The holding threatens free speech by requiring federal courts to mete out draconian punishment, pursuant to the Hobbs Act and RICO, against political protestors who engage in even minor threats or acts of violence. Such actions are already illegal under state law and should be dealt with by the state, not the federal, courts.

STATEMENT

The Hobbs Act criminalizes three activities: (1) extortion (including attempts or conspiracies to commit extortion); (2) robbery (including attempts or conspiracies to commit robbery); and (3) acts or threats of violence "in furtherance of a plan or purpose to do anything in violation of this section." The Seventh Circuit, in an alarming effort to keep this case alive and in direct contradiction to the holding of this Court, has resorted to re-writing the third option to eliminate the explicit requirement that the prohibited violence must be "in furtherance" of a violation of this section, i. e., in furtherance of either robbery or extortion.

The Seventh Circuit disregards the explicit requirement that violence or threats of violence give rise to liability under the Hobbs Act only when they are "in furtherance of" robbery or extortion. Under the Seventh Circuit's interpretation, any freestanding act or threat of violence, however unconnected to the crimes of extortion or robbery, becomes a Hobbs Act violation if the act affects commerce. The Seventh Circuit's re-writing of the Hobbs Act transforms the statute from one that was enacted to penalize crimes of acquisition to one that criminalizes all manner of violence and threats of violence,

regardless of whether the perpetrator intended to acquire property.

Under the Seventh Circuit's ruling, all violent acts and threats which affect interstate commerce become "predicate acts" under the RICO statute (18 U.S.C. §1961) which includes violations of the Hobbs Act (18 U.S.C. §1951) as racketeering acts.

As the instant case graphically illustrates, the expanded definition of the Hobbs Act (and thus the RICO statute) creates a crushing political weapon in the hands of those such as the Respondents, who strive to stifle the voices of those with whom they disagree.

SUMMARY OF ARGUMENT

The decision of the Seventh Circuit misconstrues the plain language of the Hobbs Act. The language of the Hobbs Act is unambiguous and does not cover violent actions unconnected with extortion or robbery. Even assuming, for argument's sake, that the language is ambiguous (which it is not) the expanded interpretation urged by the Seventh Circuit is inconsistent with the legislative history of the Hobbs Act, the RICO statute and the FACE statute, and violates the rule of lenity.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE HOBBS ACT INDICATES THAT IT DOES NOT APPLY TO ACTS OR THREATS OF VIOLENCE THAT ARE UNRELATED TO ROBBERY OR EXTORTION.

It is a fundamental rule of interpreting statutes to begin with the text of the statute. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Words are to be given their ordinary meaning. *Russello v. United States*, 464 U.S. 16, 21 (1983).

The Hobbs Act, 18 U.S.C. § 1951 (a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section*, shall be fined under this title or imprisoned not more than twenty years, or both.

One can violate the Hobbs Act by 1) robbery and attempts or conspiracies to commit robbery; 2) extortion and threats or conspiracies to commit extortion; or 3) threatening or committing violence in furtherance of a violation of this section; i.e., in furtherance of robbery or extortion.

The Seventh Circuit expands the definition of the Hobbs Act by blatantly ignoring the fifteen words (italicized above) that limit and modify the violent acts or threats that constitute the

third option for a Hobbs Act violation. Had Congress intended to federalize prosecution for acts of violence and threats of violence affecting commerce, there would have been no need for those fifteen words, and the words would not have been included. It would be odd and redundant for Congress to combine with the crimes of robbery and extortion the general offense of violent acts against persons and property. Every robbery involves a threat of violence against people or property along with the element of a taking and carrying away of personal property. As such, the Seventh Circuit's interpretation of the statute renders the robbery offense superfluous and obviates its recital in the statute. The statutory construction urged by the Seventh Circuit makes sense only if those italicized 15 words are ignored.

In its ruling, the Seventh Circuit argues against the plain meaning of the statute by noting that, the "physical violence" clause of 18 U.S.C. §1951 (a) would, in many or most cases, define activity already prohibited by the "attempt" or conspiracy prohibitions of the statute. While some overlap may exist, the "physical violence" provision would apply to cases in which a defendant engages in violence or threats of violence which relate to robbery or extortion but which fall short of attempt or conspiracy to commit extortion or robbery. In *United States v. Franks*, 511 F.2d 25, 31 (1975), (in which the court rejected the notion that an act or threat of violence unrelated to extortion or robbery violated the Hobbs Act) the court observed: "We construe the statute as reaching physical violence designed to culminate in extortion, even if the scheme aborts prior to extortion."

If there is a redundancy between the "physical violence"

clause and other prohibitions in the statute, the redundancy undoubtedly exists because Congress intended to avoid any potential and unforeseen loopholes through which an extortionist, robber, or "assistant" could slip. Other redundancies certainly exist within this statute. The term "obstructs, delays, or affects commerce" could probably have been edited to "affects commerce" without any change in the scope of the Act. The terms "article" and "commodity" are redundant because all commodities are articles. The terms "affects commerce" and "the movement of any article or commodity in commerce" are duplicative.

It is apparent that Congress, in defining the Hobbs Act offenses, used definitions that to some degree overlapped, in order to assure that all conduct relating to the crimes of robbery and extortion were prohibited. After all, the Hobbs Act and its predecessor, the 1934 Federal Anti-Racketeering Act, were enacted to address the problem of organized crime, which often involves participation by numerous individuals at many levels. Given the nearly limitless possible scenarios for participation in the crimes of robbery and extortion, it is entirely reasonable that Congress engaged in a bit of verbal superfluity in order to assure that every base was covered.

II. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT IS CONTRADICTED BY THE HOBBS ACT'S LEGISLATIVE HISTORY.

The Hobbs Act is unambiguous on its face. Therefore, no further judicial inquiry as to its meaning is necessary or appropriate, and the Court need not and should not resort to an

analysis of legislative history or to principles of statutory construction. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, (1992). ("When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.")

However, even assuming—but not conceding—that the "physical violence" clause of the Hobbs Act is ambiguous on its face and susceptible to the interpretation set forth by the Seventh Circuit, the legislative history of the Hobbs Act demonstrates that Congress did not intend the statute to apply to acts and threats of violence absent a connection to extortion or robbery.

Any analysis of the Hobbs Act must begin with an analysis of the Act's predecessor, the Federal Anti-Racketeering Act of 1934, 48 Stat. 979, ch. 569, which the Hobbs Act subsequently amended. The original language of the 1934 bill provided that it was a crime to commit or threaten to commit "any act of violence . . . to a person or property" in "connection with or in relation to any act in any way . . . affecting . . . commerce." S. 2248, 73rd Cong. Sec. 2 (1) (1934). (reprinted at 78 Cong. Rec. 5734). After representatives of organized labor expressed concern regarding the breadth of the language, the measure was amended to limit the proscribed activity to robbery, extortion and violence in furtherance of robbery and extortion.[2] Clearly,

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2 The Anti-Racketeering Act of 1934 provided in pertinent part:

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trace or commerce—(a) Obtains or

the 1934 Act did not cover freestanding acts or threats of violence unconnected to the crimes of extortion and robbery.

In 1946, the Federal Anti-Racketeering Act of 1934 Act was amended by the Hobbs Act for a single reason: Congress was dissatisfied with this Court's decision in *United States v. Teamsters*, 315 U.S. 521 (1942) wherein the Court held that the 1934 Act did not cover the actions of union truck drivers who exacted money by threats or violence from out-of-town drivers in return for undesired services. The Hobbs Act, then, deleted the exception on which the Court relied in *Teamsters* and substituted specific prohibitions against robbery and extortion. *United States v. Enmons*, 410 U.S. 396, 402 (1973). Congressional debates on the Hobbs Act centered on whether the bill was designed as an attack on organized labor. 91 Cong. Rec. 1148 (1945). In response, supporters of the Hobbs Act steadfastly maintained that the sole purpose of the bill was to prohibit robbery and extortion perpetrated by anyone, including labor unions.

Rep. Hancock of New York, sponsor of the bill, said:

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attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear. . .;or

(c) Commits or threatens to commit an act of Physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b). . . .

"The bill is designed simply to prevent both union members and nonunion people from making use of robbery and extortion under the guise of obtaining wages in obstruction of interstate commerce . . . that is all it does." 91 Cong. Rec. 11900 (1945).

Rep. Hobbs, after whom the bill was named, said of the bill:

". . .You know it is so clearly expressed that it will do the job it is meant to do, which is to prevent interference with interstate commerce by robbery or extortion. That is all we are shooting at." 91 Cong Rec. 11912 (1945).

No one argued that the Hobbs Act created the entirely new federal crime of violence unconnected to the underlying crimes of robbery or extortion. The resulting 1946 version of the Hobbs Act specifically linked "acts of physical violence" to "robbery" and "extortion."

The 1948 revisions to the Hobbs Act were intended to be limited to formal and stylistic changes. At no point during the revision process did anyone suggest that the Hobbs Act's scope would be expanded to include acts of violence unconnected to robbery or extortion.

Such an expansion of the Hobbs Act would federalize all manner of violent crimes. Yet, this Court has consistently held that it should not too readily interpret federal statutes in a manner that would insert federal jurisdiction in an area traditionally reserved to the states. As noted in *United States v. Enmons*, 410 U.S. 396, 411 (1973):

[I]t would require statutory language much more explicit

> than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

Had Congress intended such a sweeping expansion of the 1934 Act, one would assume that the debate would have at least touched on that issue. It did not. Had Congress intended to extend federal jurisdiction to criminal activity usually reserved to states, it would have used statutory language that explicitly made such provisions. It did not.

III. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT IS ALSO INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE RICO AND FACE STATUTES.

A. The Legislative History of the RICO Statute Militates Against the Seventh Circuit's Interpretation.

In an earlier version of the RICO statute, 18 U.S.C. §1961, racketeering activity was defined as "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year." Senators Edward M. Kennedy and Philip A. Hart complained that the bill reached beyond "organized crime." The ACLU also opposed the measure, because the definition of "racketeering" could have been used against anti-

war demonstrations at the Pentagon and Columbia University and would result in "a large number of unintended applications." As a result of these objections, the broad language contained in the initial bill was replaced with a list of designated federal and state offenses. *See,* Note, 75 Notre Dame L. Rev. 691, 697-698. If the Court accepts the Plaintiff's interpretation of the Hobbs Act as covering even freestanding acts of violence, the result will be that which Congress, when it enacted RICO, intended to avoid. Violent acts and threats unconnected to robbery and extortion would require federal prosecution under RICO, by means of an expanded Hobbs Act.

If, as the Seventh Circuit suggests, all acts of violence affecting interstate commerce and threats of violence constitute Hobbs Act violations (and thus RICO violations), then it is strange indeed that Congress specifically enumerated, as racketeering acts, a variety of crimes which are inherently violent, including arson, murder and murder for hire. 18 U.S.C. sec 1961. Had Congress intended the Hobbs Act to apply as a catch-all for all violent crimes, there would have been no need to designate these specific violent crimes as "racketeering acts." in the RICO statute. The fact that Congress *did* distinguish certain *specific* violent offenses as predicate "racketeering acts" demonstrates that Congress did not interpret or intend the Hobbs Act (or RICO) to reach all violent conduct and thus to extend federal jurisdiction.

B. The Legislative History of the FACE Statute Militates Against the Seventh Circuit's Interpretation.

Further evidence that the Seventh Circuit's decision is unsupported by legislative history is found in the 1993 debates

regarding the enactment of the Freedom of Access to Clinic Entrances (FACE) 18 U.S.C. §248.[3] Abortion advocates argued that the FACE statute was needed because existing laws (presumably including the Hobbs Act and RICO) were inadequate to protect abortion clinics. During the FACE debates, Attorney General Janet Reno testified "existing Federal laws, while perhaps applicable in some instances [are] inadequate." Hearing before the Senate Committee on Labor and Human Resources, 103rd Cong. 1st Sess. P. 8 (May 12, 1993). Rep. Schumer voiced similar concerns. Hearings before the House Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 103 Cong. 1st Sess., p. 1 (April 1 and June 10, 1993).

The fact that Congress enacted FACE to address this perceived inadequacy is a further indication that the Hobbs Act did not contain nor could it serve as a catch-all prohibition against violent threats and actions directed against abortion clinics. Notably, Congress did not add FACE violations to the list of RICO predicate acts in 18 U.S.C. sec. 1961. If Congress had intended RICO to address violent protests against abortion clinics, it certainly would have added FACE violations to the list of "racketeering" acts set forth in 18 U.S.C. sec. 1961. It did not.

IV. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT

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3 18 U.S.C. §248 (a) provides criminal and civil penalties for obstructing, injuring, intimidation and interference with persons in connection with reproductive health services.

CONTRADICTS THE RULE OF LENITY.

Assuming *arguendo* that the Seventh Circuit was correct when it stated that the language of the Hobbs Act in question here is susceptible to either of two interpretations, the basic principle of lenity requires that the narrower construction be adopted. This rule was articulated in *Dowling v. United States*, 473 U.S. 207 (1985), in which the Supreme Court determined that bootleg phonograph records were not "goods" obtained by fraud:

> [W]hen assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogative of Congress in defining federal crime prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate.

This Court has noted that the rule of lenity is informed by two policies that have long been a part of our tradition. First, a criminal statute requires that fair warning be given as to the nature of the activity it proscribes; and, second, the legislature and not the courts should define criminal activity to be proscribed. *United States v. Bass*, 404 U.S. 336, 348, (1971). "The Court has often stated that where there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite languages." *McNally v. United States,* 483 U.S. 350, 359-60 (1987) (citations omitted).

This Court has applied the rule of lenity to an effort by the government to expand the Hobbs Act to legitimate labor

disputes in which violence occurred. *U.S. v. Enmons,* 410 U.S. 396, 411 (1973). Lenity "is especially appropriate in construing [a statute which] is a predicate offense under RICO," as this Court has held. *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

The Seventh Circuit's rejection of the rule of lenity is particularly puzzling. The Court, basically, opined that there was so little at stake regarding the two competing interpretations of the Hobbs Act, that the rule of lenity shouldn't apply. Contrary to the opinion of the Seventh Circuit, application of the rule of lenity has never been limited to circumstances in which the sky is falling. If Congress wanted to federalize all violent crime, it must enact legislation that clearly expresses that intent. It has not. Otherwise, the rule of lenity applies to criminal statutes.

CONCLUSION

This Court should reverse the decision of the Seventh Circuit.

Respectfully submitted,

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